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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Request for Declaratory Ruling) FCC File No. 97-_____
Pursuant to Rule 1.2 of the)
Commission's Rules)
)
Amendment to the Commission's) WT Docket No. 95-197 ¹⁵⁷
Rules Regarding a Plan for)
Sharing the Costs of Microwave)
Relocation)

RESPONSE TO PETITION FOR DECLARATORY RULING

The PCIA Microwave Clearinghouse ("PCIA" or the "Clearinghouse")¹, by its attorneys, respectfully submits this Response to the Petition for Declaratory Ruling ("Petition") submitted to the Federal Communications Commission ("FCC" or "Commission") by Powertel PCS, Inc. ("Powertel"), requesting the Commission to clarify its rules regarding microwave relocation cost-sharing involving an alleged inconsistency between the cost-sharing

¹PCIA Microwave Clearinghouse is one of two entities designated by the FCC to administer the cost-sharing process. The PCIA Microwave Clearinghouse is a non-profit association representing members with interest in the FCC cost-sharing program. The Board of Directors of the Clearinghouse is comprised of members who hold PCS licenses in the A-F Blocks. The Policies and Procedures of the Clearinghouse have been developed in conjunction with the advice of the Clearinghouse membership, Board of Directors, as well as the PCIA staff. Those Policies and Procedures have been refined from time to time as more experience has been gained by the Clearinghouse in the cost-sharing process. The Clearinghouse has kept the FCC staff periodically advised of its Policies and Procedures and of various potential issues of dispute or interpretation.

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rules as discussed in the Report & Order² and as finally promulgated in the Rules.

The present case evolves from a Cost-Sharing Obligation Notification ("Notice") sent to Powertel on April 3, 1997, by the PCIA Microwave Clearinghouse, indicating a cost-sharing obligation owed by Powertel to Sprint Spectrum, L.P. ("Sprint") for Link ID number 1773. The Notice was issued as the result of a determination by the Clearinghouse that Powertel's PCNs for base stations M0068 and M0069, both located within the Memphis/Jackson MTA, were within the Proximity Threshold Test performed by the Clearinghouse for the relocated microwave path.

Powertel has disagreed with the Clearinghouse's use of the Proximity Threshold Test as the determinant of a cost-sharing obligation, asserting that it does not owe a cost-sharing obligation for the path because the relocated path was outside of Powertel's licensed MTA and solely within the relocater's (here, Sprint's) frequency block. Powertel's conclusion is based on its assertion that the reference to the Matrix in part of the Report & Order conflicts with the language of Commission Rule Section 24.247(a) and that, based on the Matrix, there is no cost-sharing obligation triggered when the relocated microwave path is completely inside the relocater's market and frequency block. Powertel's position is

²Amendment to the Commission's Rules Regarding a Plan for Sharing Costs of Microwave Relocation, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Reg. 8825 (1996) (hereinafter "Report & Order").

contradicted by the clear language of Section 24.247 of the Commission's Rules, which provides for a cost-sharing obligation to occur regardless of whether the path is within a licensee's MTA, as long as the licensee's base station is within the Proximity Threshold.

The present dispute does not lend itself to the Alternate Dispute Resolution procedures established by the PCIA Clearinghouse and mandated by the FCC, as it involves a disagreement by PCS licensees over application and interpretation of the Commission's Rules. Accordingly, Commission clarification of this matter is required, not only as to this case, but as to the overall procedures currently being followed by the Clearinghouse.

RESPONSE

Contrary to Powertel's assertion, it is not a " cursory review " of the triggering Rule found in Section 47 C.F.R. § 24.247, or a " narrow reading of the rule ", which resulted in the issuance by the PCIA Clearinghouse of a reimbursement obligation notice. Rather, it is the clear and unambiguous language of the text of the Commission's Rule in Section 24.247, as written, which mandates a reimbursement obligation in applying the Proximity Threshold Test. Section 24.247, " Triggering a Reimbursement Obligation ", states:

(a) Licensed PCS. The Clearinghouse will apply the following test to determine if a PCS entity preparing to initiate operations must pay a PCS relocater in accordance with the formula detailed in § 24.243:

(1) all or part of the relocated microwave link was initially co-channel with the licensed PCS band(s) of the subsequent PCS entity;

(2) a PCS relocater has paid the relocation costs of the microwave incumbent; and

(3) the subsequent PCS entity is preparing to turn on a fixed base station at commercial power and the fixed base station is located within a rectangle (Proximity Threshold)..." (Emphasis added.)

Subparagraph (3) of Rule Section 22.247 makes it clear that a reimbursement obligation occurs when the "fixed base station is located within the [Proximity Threshold Test]". A review of the text of the language of that rule does not create any ambiguity as to the interpretation which must be applied by the Clearinghouse. The Rule Section is entitled "Triggering a Reimbursement Obligation." The language in Section 24.247(a), which states that "the Clearinghouse will apply the following test. . .", mandates that the Clearinghouse apply the Proximity Threshold Test to determine a reimbursement obligation. The plain meaning of the language of the Rule is therefore clear. Under settled principles of statutory and rule construction, a court may defer to administrative interpretations of a statute or regulation only when the plain meaning of the rule itself is doubtful or ambiguous. Secretary of Labor, Mine Safety and Health Administration v. Western Fuels-Utah, Inc. and Federal Mine Safety and Health Review Commission, 283 U.S. App. D.C. 334, 900 F2d 318 (1990). Further, a court should be guided by an administrative construction of a regulation only "if the meaning of the words used is in doubt." Udall v. Tallman, 380 U.S. 1, 85 S. Ct. 792 (1965).

PCIA recognizes that a review of part of the Report & Order and NPRM creates an ambiguity with respect to the text of the rule and the cost-sharing Matrix referred to in the Report & Order and the NPRM. Because the Commission's Rules constitute the official statement of law, the PCIA Microwave Clearinghouse is required to determine cost-sharing obligations based on what is stated in the Rules and not based on any alleged conflicting language in the text.

Powertel's Petition argues that, under the Administrative Procedures Act ("APA"), the Commission cannot interpret its written rules in a manner which is inconsistent with the underlying Report & Order. See, Petition, Section C, page 5. Clearly, the APA³ requires an agency to provide a concise general statement of the basis and purpose of the rules it adopts. PCIA submits that its reliance on the Commission's published Rule is mandated, as the Commission is not permitted to adopt an interpretation of its rules (in this case, the Report & Order) which conflicts with the written rule, unless proper notice and comment procedures have been followed. See, Exportal Ltd., Mario Fantuzzi and Jesus Villasante v. USA, 284 U.S. App. D.C. 80, 902 F2d 45 (1990).

Considering Powertel's argument, it is PCIA's view that it is, at best, unclear whether the Commission intended to allow reimbursements for links with both endpoints in the relocators' market or whether the omission of this restriction from the rules was inadvertent. The point being that, when the entire NPRM and Report

³ 5 U.S.C. Section 553 (c).

Report & Order are examined, particularly in light of the deletion of Bulletin 10-F and the adoption of the Proximity Threshold Test, there is clear support for the language found in Rule Section 24.247 and that the confusion is in the failure to clarify or delete portions of the Matrix. Hence, the adoption of the Proximity Threshold Test was the critical decision factor supporting the test adopted in the language of Rule Section 24.247.

A review of the NPRM and the Report & Order demonstrates a significant change on final adoption in the Report & Order. In the Report & Order, the Commission adopted the Proximity Threshold Test in lieu of the earlier proposed use of Bulletin 10-F to determine interference for purposes of cost-sharing. The Commission, in the Report & Order, recognized that the use of the "Proximity Threshold" Test provided a "bright-line test" to determine when a cost-sharing reimbursement is triggered and that the Proximity Threshold Test simplified the process of determining when a reimbursement obligation to cost-share arises.⁴ It is clear that in adopting the Proximity Threshold Test the Commission agreed with its proponents. Further, Paragraph 32 of the Report & Order makes unequivocally clear the conditions which trigger a cost-sharing obligation. The text of Paragraph 32 is identical to the language ultimately adopted in Rule Section 24.247(a).

In addition, there is no mention of the Matrix in the portions of the Report & Order adopting the Proximity Threshold Test.

⁴R&O ¶ 31.

as the Commission stated: ". . . A PCS base station will either fall inside the reimbursement "box" or out of it. Additionally, use of the Proximity Threshold Test will permit existing and prospective PCS providers to project their cost-sharing obligations more accurately."⁵

To date, the PCIA Microwave Clearinghouse has found that use of the Proximity Threshold Test has been a fair test, easy to administer, consistent and predictable. To the extent the Commission has had to use an objective test, the Clearinghouse believes that, on the whole, the Proximity Threshold Test has achieved the results anticipated by the Commission and the industry.

In the present dispute raised by Powertel, there is no disagreement by Powertel that it received a benefit from the relocation of the microwave links by Sprint, as determined by application of the Proximity Threshold Test. Rather, Powertel's response is that the ambiguity in the Report & Order, as represented by the inclusion of the Matrix, removes any responsibility of Powertel to pay a reimbursement obligation in this instance.

CONCLUSION

The Clearinghouse has used the Proximity Threshold Test in its analysis to date, and would propose to continue to do so. Further, there are certain situations, e.g., disaggregation and/or partitioning, when MTA or BTA boundaries may be even less relevant

⁵R&O ¶ 37.

and the application of the Proximity Threshold Test becomes more significant. To the extent there is confusion or disagreement over the cost-sharing process caused by interpretations of portions of the text of the Report & Order and the Rules, the Commission needs to address these items and resolve the matter quickly, as the Clearinghouse continues to process PCNs and cost-sharing obligations. Any significant delay in clarifying this situation not only results in delay in relocators receiving reimbursement, but creates potential administrative uncertainty for the Clearinghouse in making certain determinations in the cost-sharing process. Accordingly, the Commission is urged to address and clarify these matters as quickly as possible.

Respectfully Submitted,

PCIA MICROWAVE CLEARINGHOUSE

By: 

David E. Weisman, Esq.
Meyer, Faller, Weisman
& Rosenberg, P.C.
4400 Jenifer Street, N.W. #380
Washington, D.C. 20015
(202) 362-1100
ITS ATTORNEY

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CERTIFICATE OF SERVICE

I, Victoria S. Lynch, a secretary in the law office of Meyer, Faller, Weisman & Rosenberg, P.C. hereby certify that I have on this 24th day of October, 1997, sent via first class United States mail, postage prepaid, a copy of the foregoing "Response to Petition for Declaratory Ruling" to the following:

Michael K. Kurtis, Esq.
Jeanne M. Walsh, Esq.
Scott H. Lyon, Esq.
KURTIS & ASSOCIATES, P.C.
2000 M Street, N.W., Suite 600
Washington, DC 20036


Victoria S. Lynch